



IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1976

No. 76-76-341

THE STATE OF CALIFORNIA, acting by and  
through the DEPARTMENT OF WATER  
RESOURCES,

*Petitioner,*

v.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76----

THE STATE OF CALIFORNIA, acting by and  
through the DEPARTMENT OF WATER  
RESOURCES,

*Petitioner,*

v.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,

*Respondent.*

### PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, State of California, acting by and through the Department of Water Resources, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this declaratory relief action on June 3, 1976.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix A to this petition, and is reported in 536 F.2d 304 (Ninth Cir.

1976). The opinion of the United States District Court for the Eastern District of California, which opinion is affirmed and expressly adopted in the opinion of the Ninth Circuit, appears in Appendix B, and is reported in 411 Fed.Supp. 361 (E.D.Cal. 1975).

### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 3, 1976. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Does Decision 82561 of the California Public Utilities Commission issued March 12, 1974, re Application No. 48869 conflict with the Order of the Federal Power Commission issued January 17, 1974, re Projects 2088 and 2100?

2. If a conflict does exist between the decision and order referred to in Issue No. 1, does the Federal Power Act preempt California Water Code sections 11590-11592 in this situation?

### CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, article I, section 8, clause 3, in relevant part:

"[The Congress shall have the power] To regulate commerce . . . among the several States . . . ."

### FEDERAL STATUTORY PROVISIONS INVOLVED

Section 10 of the Federal Power Act, 49 Stat. 842 (1935), 16 U.S.C. Sections 803(a), 803(b) and 803(c):

"All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

"(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of one hundred horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmis-



sion of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Section 317 of the Federal Power Act, 49 Stat. 862 (1935), 16 U.S.C. Section 825(p):

"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder. Any criminal proceedings shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be

served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs., 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this Act."

#### **CALIFORNIA STATUTORY PROVISIONS INVOLVED**

Water Code section 11590:

"The department [Department of Water Resources] has no power to take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or state agency, or the appurtenances thereof, either in the construction of any dam, canal, or other works, or by including the same within the area of any reservoir, unless and until the department has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the department and the common carrier, public utility, or state agency."

Water Code section 11591:

"The expense of the department [Department of Water Resources] in complying with the requirements of this article is part of the cost of constructing the project."

Water Code section 11592:

“In the event the department [Department of Water Resources] and any common carrier railroad, other public utility, or state agency fail to agree as to the character or location of new facilities to be provided as required in this article, the character and location of the new facilities and any other controversy concerning requirements imposed by this chapter shall be submitted to and determined and decided by the Public Utilities Commission of the State.”

#### STATEMENT OF THE CASE

In 1957 the Federal Power Commission (hereafter FPC) in the matter of FPC Project 2100 authorized the State of California's Department of Water Resources (hereafter DWR) to construct in accordance with previously approved plans a dam, reservoir and power plant on the Feather River near Oroville, California. Three years later the FPC in the matter of FPC Project 2088 authorized the Oroville-Wyandotte Irrigation District (hereafter OWID) to modify previously approved plans for its Project 2088 to permit construction of an approximate 7 mile long canal, the Miners Ranch Canal, above and parallel to a portion of DWR's reservoir. The canal would supply most of its water to a downstream power plant.

Both OWID's canal and DWR's reservoir occupy lands withdrawn by the United States for power purposes pursuant to the Federal Power Act, 16 U.S.C. § 818.

Because the Miners Ranch Canal feature of OWID's Project 2088 was smaller in size than the reservoir, dam and power features of DWR's Project 2100, the canal was completed before the reservoir was completed and filled.

It is undisputed that during the construction of Miners Ranch Canal OWID deviated from the plans approved by the FPC by 1) constructing the lower reach of the canal closer to the planned water surface elevation of Oroville Reservoir, 2) constructing a maintenance road on the reservoir side of the canal rather than on the uphill side, 3) constructing communication lines within the reservoir area itself, and 4) constructing two large siphons in a manner that would not permit them to operate once DWR's reservoir was filled.

Operation of the Miners Ranch Canal commenced in 1963. On October 14, 1966, when DWR was in the later stages of construction of Project 2100, OWID filed an application (Application No. 48869) with the California Public Utilities Commission (hereafter CPUC) alleging that DWR's reservoir when completed and filled would “take or destroy” OWID's Miners Ranch Canal. OWID requested CPUC to order DWR to replace the entire canal with a suitable replacement facility. OWID invoked the jurisdiction of CPUC pursuant to California Water Code sections 11590 to 11592, which provide in pertinent part:

“11590—The department [Department of Water Resources] has no power to take or destroy the whole or any part of the line or plant of any . . . state agency, or the appurtenances thereof, either in the construction of any dam, canal . . . unless and until the department has provided for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness . . . .”

“11592—In the event the department [Department of Water Resources] and any . . . state agency fail to agree as to the character or location of the new facilities . . . the character and location shall be submitted to and determined and decided by the Public Utilities Commission of the State.”

As there were no allegations in OWID's application, nor have there been any in this entire dispute, that DWR was constructing its reservoir in any manner other than that previously approved by the FPC, DWR invoked the jurisdiction of the FPC to determine whether OWID's contentions were correct, what was the cause of any physical conflict between the Miners Ranch Canal and Oroville Reservoir, and who had responsibility under the Federal Power Act to rectify any conflict between these two power projects.

In May of 1967 the FPC issued an order which reads in part:

“This order directs a hearing involving two projects licensed by this Commission, Project No. 2088

(South Fork Project) and Project No. 2100 (Oroville Project). The matter is occasioned by an application of the licensee for Project No. 2088 for approval of 'as built' project facility drawings. Questions at issue are whether Project No. 2088 as built can be operated and maintained consistent with Project No. 2100 as licensed. If not, what actions should be taken by the Commission at this time regarding Project No. 2088 and Project No. 2100.” (C.R., p. 349)

As a result of OWID's application before CPUC and the FPC's order of May 1967, separate administrative proceedings were conducted by both administrative bodies. The issue before the California Public Utilities Commission was whether Oroville Reservoir would take or destroy Miners Ranch Canal and, if so, what should be the replacement facility. At the outset of the hearing in 1967 before CPUC, DWR reserved its right to an adjudication of its federal law claims before the appropriate federal regulatory and judicial bodies (C.R., p. 536). After first finding that DWR's Oroville Reservoir would take or destroy Miners Ranch Canal, and ordering DWR to construct a pumping plant to replace it, CPUC ultimately amended its previous order and ordered DRW to *finance* the construction of a tunnel and other work which the FPC, as a result of the hearing before it in the matter of Projects 2100 and 2088, had ordered OWID to construct.



CPUC's Decision No. 82561, dated March 12, 1974 provides in pertinent part (C.R., pp. 393-394):

"IT IS ORDERED that:

"1. Finding 1 of Decision 79724 is amended as follows:

"The Department of Water Resources should be financially responsible for:

"(a) Replacing the lower reach of Miners Ranch Canal with a tunnel approximately 4,400 feet in length extending from the vicinity of the intake tunnel upstream to near the lower siphon, and replacing the lower reach of the canal.

"(b) Providing an improved all-weather roadway along the remaining length of the canal.

"(c) Providing slope protection below the remaining length of the canal to include an adequate mantle of course material."

With respect to OWID's departure from its FPC approved plans in construction of Miners Ranch Canal, CPUC stated as a Conclusion of Law (Decision 745423; C.R., p. 363:

"The fact Miners Ranch Canal may have been constructed too far downhill at certain points is immaterial in this proceeding."

DWR sought review of CPUC's decision from the California Supreme Court. The California Supreme Court declined without comment to review the decision. Because OWID and CPUC opposed DWR's application for review by the California Supreme

Court on the ground, among others, of timeliness, DWR requested clarification of the Supreme Court's denial, which request was also denied.

In an initial decision issued March 11, 1968 (C.R., pp. 411-457) as a result of the hearing by the FPC on Projects 2100 and 2088, the FPC's Presiding Examiner found that OWID failed during the construction of Miners Ranch Canal to fulfill its responsibility to design and construct the canal in a manner to operate compatibly with DWR's previously licensed Project 2100, and directed OWID to submit plans for modification of the canal. As a result of a hearing before the full commission on OWID's exceptions to the examiner's initial decision, the FPC ordered that a three man consulting board be established to comment on the plans submitted by OWID. The order also provided in part (C.R., p. 460):

"At oral argument OWID requested that we hold in abeyance any decision as to the MR Canal, and that we order OWID to file revised plans in this connection within 120 days. Without hereby expressing any opinion on the merits of the controversy, *we feel it appropriate to grant OWID further time to file revised plans so that we may have before us its position as to the appropriate changes to be made in the project.* Moreover, recognizing that the record shows that the DWR is not in agreement with OWID as to the revisions to be made in the plans for the MR Canal, we deem it advisable to order the OWID to retain within 30 days from the date of issuance of this order a

board of three independent qualified consultants to assess and review the adequacy and soundness of OWID's revised plans for the MR Canal or for the suitable facility to replace such canal. OWID shall nominate one of these consultants; DWR shall nominate one; and the two consultants so selected by OWID and DWR shall together nominate the third. The fees and compensation for these consultants shall be assumed jointly on an equal-division basis by OWID and DWR." (Emphasis added.)

Ultimately, the Board of Consultants recommended a general plan of modification for Miners Ranch Canal whereby the lower reach of the canal would be replaced by a tunnel, and the maintenance road in the upper reach would be modified and maintained as an all-weather road. To implement these recommendations the FPC in an order issued May 22, 1967 ordered as follows (C.R., p. 479):

*"The Commission orders:*

"(A) The District, licensee of Project No. 2088, shall within a period of six months submit to the Commission revised plans and exhibits to implement the recommendations of the Board of Consultants; shall make at quarterly intervals thereafter periodic reports to the Commission of progress of the work until completion.

"(B) The State of California Department of Water Resources (DWR), licensee of Project No. 2100, is requested to cooperate as much as possible in the situation. Cooperation will inure to the benefit of all parties concerned in maintaining the integrity of both these projects. It should help

Project No. 2088 to meet its primary purpose, namely, to develop irrigation and domestic water supplies for the use of the licensee and for the use of the Yuba County Water District (21 FPC 613, 614 (1959)). Further, it can assure continued maintenance and operation of the projects, consistently with each other."

Upon approval of the plans submitted by OWID pursuant to the above order, the FPC in its order issued January 17, 1974 (two months prior to CPUC's order of March 12, 1974 ordering DWR to be financially responsible for the work ordered by the FPC) added Article 51 to OWID's license for Project 2088. Article 51 provides (C.R., pp. 489-490):

*"Article 51. Licensee shall commence construction of the tunnel for the lower reach of the Miners Ranch Canal at the earliest possible date, but not later than September 1, 1974, and shall thereafter in good faith and with due diligence prosecute such construction, and shall complete the tunnel by August 31, 1976."* (Emphasis added)

Article 51 is substantially identical in form to Article 48 of OWID's original license for Project 2088. Article 48 designates OWID's responsibility for protecting the downstream face of one of its dams which abuts on and will be inundated by the proposed Oroville Reservoir. Article 48 provides (C.R., p. 445):

*"Article 48. At such time as the Oroville dam of Project No. 2100 is constructed, [the District] shall provide for the protection of the downstream face of the Ponderosa dam to a level consistent*



with a downstream normal water surface of elevation 900.”

DWR believes that Article 51, like Article 48, imposes full responsibility upon OWID to rectify the unauthorized modifications made to Miners Ranch Canal during its construction. The decision of CPUC placing financial responsibility upon DWR for this work conflicts with Article 51.

Because OWID threatened to seek enforcement of CPUC's decision, thereby indirectly requiring DWR to finance the costs of OWID's unauthorized modifications to the Miners Ranch Canal, DWR brought an action for declaratory and injunctive relief in the United States District Court for the Eastern District of California under section 317 of the Federal Power Act, 16 U.S.C. § 825(p), which provides in part:

“The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder.”

Jurisdiction was also asserted under 28 U.S.C. § 1337 which provides in part:

“The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . .”

Declaratory relief was requested pursuant to 28 U.S.C. § 2201 on the basis that there presently exists an actual controversy between DWR and OWID regarding a matter over which the court has jurisdiction.

The District Court found no conflict between the order of the FPC directing OWID to modify the Miners Ranch Canal and the order of CPUC directing DWR to be financially responsible for such modifications, stating (C.R., p. 871):

“At the heart of the matter, however, this court must concur with OWID and the CPUC that there is, in fact, no conflict between the decisions of the FPC and the CPUC. The decision of the FPC requires that the OWID actually construct the tunnel for the Miners Ranch Canal and provides a date for completion. The decision of the CPUC notes that the operation of the DWR project will take or destroy the Miners Ranch Canal aspect of the OWID project and therefore orders DWR to be *financially* responsible for a substitute facility.”

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court stating:

“In a well-written and comprehensive memorandum decision issued on August 8, 1975, and reported in ---- Fed. Supp. ---- (E.D.Cal. 1975), Judge Thomas J. MacBride held that CPUC decision and the FPC order were entirely compatible. We agree for the reasons set forth in Judge MacBride's decision.”

As the Court of Appeals found no conflict between the administrative orders of the FPC and CPUC, it

was not necessary for it to address the second issue presented in this petition; i.e., the preemption of state law by the Federal Power Act in this situation.

### WHY CERTIORARI SHOULD BE GRANTED

The licensing of hydroelectric projects requires, of necessity, an accommodation between projects on the same stream. Such accommodation is accomplished *before* licenses are issued and is reflected in the terms and conditions of the license. The financing, final design, land acquisition and the myriad other factors involved in the construction of a licensed project are all based on the assumption that each licensee will design and construct its respective project in accordance with the terms and conditions of its license.

Such assumption is founded on the express provisions of the Federal Power Act. Section 10(a) of the Federal Power Act, 49 Stat. 842 (1935), 16 U.S.C. § 803(a), provides in part:

“All licenses issued . . . shall be on the following conditions:

“(a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway . . . for the improvement and utilization of water-power development. . . .”

Section 10(b) of the Federal Power Act, 16 U.S.C. § 803(b), provides in part:

“(b) . . . no substantial alteration or addition not in conformity with the approved plans shall

be made . . . without the prior approval of the Commission. . . .”

It is undisputed that as a result of the Court of Appeals' decision DWR is now responsible for conditions which would not have existed but for OWID's unauthorized modifications to Miners Ranch Canal. It is undisputed that when the licenses for Project 2100 and 2088 were issued it was not anticipated that OWID would unilaterally modify its Project 2088 and bring it into conflict with DWR's Project 2100. It is undisputed that the one conflict which was anticipated when the license was issued for Project 2088 was the partial inundation of Project 2088's Ponderosa Dam. That conflict was resolved by the inclusion of Article 48 in OWID's license.

Article 51 resolves this same type of conflict with respect to Miners Ranch Canal. Article 51 unequivocally places full responsibility upon OWID for the modification of Miners Ranch Canal. Even the prior decision of the Court of Appeals in *Pacific Power & Light Company v. Federal Power Commission*, 333 F.2d 689 (9th Cir. 1964) confirms this conclusion. In that case it was urged that an agreement between the California Department of Fish and Game and the Pacific Power and Light Company required the Department to be financially responsible for the operation and maintenance of a fish hatchery and related facilities constructed by the power company. The court, referring to the agreement and the conditions



in the power company's FPC license, stated (at page 695):

"The short answer to Pacific's second contention is that there is nothing in the agreement with the Department, or the release, that requires that the Department, rather than Pacific, pay for the operation or maintenance of the hatchery. On the other hand, Article 49 of Pacific's license does require Pacific to 'construct, maintain and operate, or \* \* \* arrange for the construction, maintenance and operation of artificial propagation facilities \* \* \* as may be prescribed hereafter by the Commission \* \* \*.'"

It is apparent that the Court of Appeals does not regard the conflict between the Miners Ranch Canal and Oroville Reservoir as a regulatory matter but a condemnation matter, which under ordinary principles turns on state law; i.e., Water Code section 11590. The decision of the United States District Court, which the Court of Appeals adopts, refers to the "taking and destruction" of Miners Ranch Canal by Oroville Reservoir. The District Court states:

"This court concurs that the action of the CPUC, pursuant to California Water Code §§ 11590-11592, in establishing the financial liability of DWR for the taking and destruction of a portion of the OWID project, was a permissible action. The CPUC did not substantially alter nor did it prevent the operation of federal power projects. The CPUC action was not an interference with federal power projects, but rather, was in aid of these projects. As such, the action of the

CPUC was entirely compatible with the duality inherent in the Federal Power Act."

This reasoning, which totally ignores that the causes for the physical conflict were the result of OWID's intentional departure from the terms and conditions of its license, sanctions conduct which is totally inconsistent with the comprehensive regulatory scheme developed by the Federal Power Act. DWR, like any other FPC licensee, is a licensee because the law compels it to be. It has an obligation to plan, design, construct and operate its licensed projects in accordance with the terms of its license, but it also has a corresponding right to demand that others do the same. A federal regulatory system which permits one licensee to unilaterally relieve itself of its obligation, subject its project features to physical damage and then seek refuge under state condemnation law is no regulatory system at all.

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) this court affirmed the exclusive regulatory powers of the FPC in the licensing of hydroelectric projects. The court stated (at p. 167):

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the

division of the common enterprise between two co-operating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§4(e), 10(a), (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission."

Rule 19(1)(b) of the Supreme Court Rules states that one of the grounds which will be considered for certiorari is where a court of appeals "has decided a federal question in a way in conflict with applicable decisions" of this court. The decision of the Court of Appeals substantially erodes the comprehensive regulatory scheme which this court declared to exist in *First Iowa*, and for that reason is totally in conflict with the principles set forth therein. Further, the decision rewards a licensee for the intentional violation of the terms of its license and the Federal Power Act, and for this reason is also in conflict with the principle set forth by lower courts that no licensee should benefit by avoidance of its obligations under the Act and its license. *Central Maine Power Company v. Federal Power Commission*, 345 F.2d 875 (C.A. 1st 1965); *Rumford Falls Power Company v. Federal Power*

*Commission*, 355 F.2d 683 (C.A. 1st 1966); *Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153 (C.A.D.C. 1967).

### CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX A**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, acting by and  
through the DEPARTMENT OF WATER  
RESOURCES,

*Plaintiff-Appellant,*

vs.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,

*Defendant-Appellee.*

No. 75-3091

OPINION

[June 3, 1976]

Appeal from the United States District Court  
for the Eastern District of California

Before: HUFSTEDLER and CHOY, Circuit Judges,  
and PREGERSON,\* District Judge.

PER CURIAM:

This is an appeal in a controversy between two agencies of the State of California, the Department of Water Resources and The Oroville-Wyandotte Irrigation District. The principal issue is whether Decision 82561 of the California Public Utilities Commission issued March 12, 1974 in Application No. 48869 conflicts with the order of the Federal Power Commission issued January 17, 1974 affecting Projects 2088 and 2100.

\* Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation.

In a well-written and comprehensive memorandum decision issued on August 8, 1975, and reported in ---- Fed. Supp. ---- (E.D.Cal. 1975), Judge Thomas J. MacBride held that CPUC decision and the FPC order were entirely compatible. We agree for the reasons set forth in Judge MacBride's decision.

**AFFIRMED**

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**APPENDIX B**

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ORIGINAL FILED  
AUG 8, 1975  
CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
By \_\_\_\_\_ DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

THE STATE OF CALIFORNIA, acting by and  
through the DEPARTMENT OF WATER  
RESOURCES,

*Plaintiff and  
Counterdefendant,*

vs.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,

*Defendant and  
Counterclaimant.*

CIVIL No.  
S-74-597

**MEMORANDUM  
HISTORY OF THE CASE**

Plaintiff State of California, acting through the Department of Water Resources [hereafter DWR] initiated this declaratory and injunctive relief action against defendant Oroville-Wyandotte Irrigation District [hereafter OWID]. Both DWR and OWID are agencies of the State of California. California Water Code § 120 and § 11102. Both DWR and OWID are also licensees of the federal government through the Federal Power Commission [hereafter FPC]: DWR is licensed by the FPC pursuant to the Federal Power Act to construct and operate Project 2100 (a dam, reservoir, powerhouse, and related facilities on the

Feather River near Oroville); OWID is licensed by the FPC pursuant to the Federal Power Act to construct and operate Project 2088 (a series of dams, reservoirs, powerhouses and canals on the South Fork of the Feather River near Oroville).

A segment of OWID's Project 2088 is the Miners Ranch Canal, a seven-mile long canal, communication line and maintenance road located above and parallel to a portion of DWR's Project 2100 reservoir in the Feather River's South Fork Canyon. In 1966, a dispute arose between DWR and OWID regarding the design, construction, and operation of the Miners Ranch Canal. OWID contended that the licensed operation of the DWR reservoir would destroy OWID's Miners Ranch Canal. DWR contended that even if OWID were correct, such damage would result from unauthorized modifications of the Miners Ranch Canal by OWID in violation of OWID's obligations under the Federal Power Act and OWID's license with the FPC.

From this basic dispute there followed two separate administrative proceedings—one before the FPC and the other before the California Public Utilities Commission [hereafter CPUC]—both of which resulted in final decisions. The effect of these decisions on the parties is the particular question which confronts this court. To fully understand the state of this case, it will be necessary to review these prior proceedings before the FPC and the CPUC.

(1) Proceedings before the FPC.

The Federal Power Act, Title 16 USC § 791(a) requires that each licensee file with the FPC for approval "as built" drawings reflecting its respec-

tive project as constructed. OWID filed its "as built" drawings of Project 2088 with the FPC on November 7, 1966. DWR filed a protest to this application and petitioned to intervene in the proceedings on March 6, 1967. On May 22, 1967, the FPC ordered that a hearing be held regarding both OWID's Project 2088 and DWR's Project 2100:

"This order directs a hearing involving two projects licensed by this Commission, Project No. 2088 (South Fork Project) and Project No. 2100 (Oroville Project). The matter is occasioned by an application of the licensee for Project No. 2088 for approval of 'as built' project facility drawings. Questions at issue are whether Project No. 2088 as built can be operated and maintained consistent with Project No. 2100 as licensed. If not, what actions should be taken by this Commission at this time regarding Project No. 2088 and Project No. 2100."

A hearing was held and on March 11, 1968, the FPC's Presiding Examiner issued an "Initial Decision." That decision held that OWID had a responsibility to design and construct the Miners Ranch Canal feature of its Project 2088 to operate compatibly with DWR's previously licensed Project 2100.

OWID filed exceptions to this initial Decision and oral arguments were presented to the FPC, en banc, on November 18, 1968. The FPC issued its order January 29, 1969, permitting OWID to file revised plans for Miners Ranch Canal and directing OWID and DWR to establish a three-man Board of Consultants to review the revised plans submitted by



OWID, and any comments thereto submitted by DWR. The FPC order noted:

“At oral argument OWID requested that we hold in abeyance any decision as to the Miners Ranch Canal, and that we order OWID to file revised plans in this connection within 120 days. Without expressing any opinion on the merits of the controversy, we feel it appropriate to grant OWID further time to file revised plans so that we may have before us its position as to the appropriate changes to be made to the project. Moreover, recognizing that the record shows that the DWR is not in agreement with OWID as to the revisions to be made in the plans for the Miners Ranch Canal, we deem it advisable to order the OWID to retain within 30 days from the date of the issuance of this order a board of three independent qualified consultants to assess and review the adequacy and soundness of OWID's revised plans for the Miners Ranch Canal or for the suitable facility to replace such canal. OWID shall nominate one of these consultants; DWR shall nominate one, and the two consultants so selected by OWID and DWR shall together nominate the third.”

OWID submitted revised plans, and DWR its comments thereto, and on July 3, 1969, the Board of Consultants issued a report thereon, and a follow-up report on December 12, 1969. On February 18, 1970, the FPC issued its “Order Upon Consideration of Reports by Board of Consultants and the Record Herein.” The FPC ordered OWID to submit within

six months, a revised set of plans to implement the recommendations of the Board of Consultants, and requested the DWR to “cooperate as much as possible in the situation.”

OWID submitted revised plans to the FPC, DWR reviewed the revised plans and recommended that the Board of Consultants be again convened to review the plans. The FPC, through its Secretary, directed that the Board of Consultants be again convened and on December 7, 1971, the Board of Consultants issued its third report.

Ultimately, OWID submitted a final revised plan which was approved by the FPC in its order of January 17, 1974. That order added Article 51 to the conditions set forth in OWID's license for Project 2088, which article provides:

“Article 51. Licensee [OWID] shall commence construction of the tunnel for the lower reach of the Miners Ranch Canal at the earliest possible date, but not later than September 1, 1974, and shall thereafter in good faith and with due diligence, prosecute such construction, and shall complete the tunnel by August 31, 1976.”

The order of the FPC became a final order on February 12, 1974.

(2) Proceedings before the CPUC.

On October 12, 1966, OWID filed Application No. 48869 with the CPUC alleging that the close proximity of Oroville Reservoir to the Miners Ranch Canal created conditions which would ultimately take or destroy the canal. OWID asserted that California Water Code §§ 11590-11592 (West 1973) required DWR to construct a replacement facility for the entire Miners



Ranch Canal. Sections 11590-11592 provide as follows:

“§ 11590. Substitution of facilities; agreement

The department has no power to take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or state agency, or the appurtenances thereof, either in the construction of any dam, canal, or other works, or by including the same within the area of any reservoir, unless and until the department has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the department and the common carrier, public utility, or state agency.”

“§ 11591. Expenses

The expense of the department in complying with the requirements of this article is part of the cost of constructing the project.”

“§ 11592. Public Utilities Commission; submission of controversies

In the event the department and any common carrier railroad, other public utility, or state agency fail to agree as to the character or location of new facilities to be provided as required in this article, the character and location of the new facilities and any other controversy concerning requirements imposed by this chapter shall be

submitted to and determined and decided by the Public Utilities Commission of the State.”

DWR responded to OWID's application by way of a motion to dismiss for lack of jurisdiction asserting that the FPC and the federal courts have exclusive jurisdiction over disputes arising under the liabilities and duties imposed upon FPC licensees by their respective power licenses and by the Federal Power Act. DWR's motion was denied. A petition for rehearing was filed and it was denied.

A hearing was conducted in September 1967 and at the outset of the hearing, counsel for DWR stated:

“MR. SKJEIE: First of all, I'd like the record to be made plain in one respect and that is that by its participation herein, the State in no way waives its federal law claims for its right to an adjudication thereof in the Federal Courts and before the Federal Power Commission.”

On August 13, 1968, CPUC rendered Decision No. 74542. That decision held that DWR was responsible for replacing the entire Miners Ranch Canal with a substitute facility, a pumping plant:

“1. The substitute facility to be provided by the respondent Department of Water Resources pursuant to Section 11590 for the facilities of the applicant Oroville-Wyandotte Irrigation District to be taken or destroyed by said Department of Water Resources shall be a plant designed to pump water from Oroville Dam into the Miners Ranch Tunnel. The flow of water from applicant's upstream storage area will be directed into Oroville Dam as soon as the pumping plant is in operation.”

With respect to FPC jurisdiction, the CPUC noted in Decision 74542 as follows:

“It is difficult to conceive how any Commission [CPUC] action could interfere with the jurisdiction of the Federal Power Commission. The latter agency is not concerned with local disputes other than to insure that sponsored projects are efficiently constructed to perform stated functions.”

On October 8, 1968, DWR's petition for rehearing of Decision 74542 was denied. On August 10, 1970, OWID petitioned CPUC for a modification of Decision 74542 to change the facilities which DWR was ordered to construct from a pumping plant to a tunnel. Pursuant to OWID's petition, CPUC rendered Decision 79724 on February 15, 1972, which provided:

“IT IS ORDERED that:

“1. Ordering paragraph 1 of Decision No. 74542 is superseded as follows:

The substitute facilities to be provided by the respondent Department of Water Resources pursuant to Section 11590 for the facilities of the applicant, Oroville-Wyandotte Irrigation District, to be taken or destroyed by said Department of Water Resources shall be as follows:

(a) A tunnel approximately 4,400 feet in length extending from the vicinity of the intake tunnel upstream to near the lower siphon, and replacing the lower reach of the canal.

(b) An improved all-weather roadway along the remaining length of the canal.

(c) Slope protection below the remaining length of the canal providing an adequate mantle of coarse material.”

DWR petitioned for rehearing and CPUC granted a partial rehearing on the question “whether any inconsistency which may exist between Finding No. 1 of Decision No. 79724 and any FPC Order may be caused by ordering the Department of Water Resources to be *financially* responsible for” the requirements of paragraph 1 of Decision 79724.

On March 12, 1974, CPUC issued Decision 82561 revising paragraph 1 of Decision 79724 by making DWR *financially* responsible for the requirements imposed by that paragraph.

Pursuant to California Public Utilities Code § 1756, DWR petitioned the California Supreme Court for review of the CPUC Decision 82561. The petition for review was untimely filed. On September 12, 1974, the petition was denied without a hearing and without an opinion. A petition for rehearing of the denial was also denied without hearing or opinion on October 10, 1974.

### MOTION FOR INTERVENTION

As an initial matter, CPUC has moved this court to intervene pursuant to Federal Rules of Civil Procedure 24(a)(2), intervention as of right, or in the alternative, Rule 24(b), permissive intervention. At a January 3, 1975, hearing on this and other motions, neither DWR nor OWID objected to the intervention of CPUC, and accordingly, this court granted CPUC's motion to intervene.

## CONTENTIONS OF THE PARTIES

### (1) DWR's Complaint.

Plaintiff DWR filed this action for declaratory and injunctive relief on October 3, 1974, asserting that the orders of the FPC (specifically the January 17, 1974, order adding article 51 to the conditions of OWID's license) and the order of the CPUC (specifically the March 12, 1974, Decision 82561 making DWR financially responsible to provide substitute facilities for Miners Ranch Canal) conflict on both the law and the facts.

In this regard, plaintiff DWR sought two things: (a) declaratory relief as to which order controls the obligations of OWID and DWR; and (b) since OWID has demanded that DWR comply immediately with the order of the CPUC, DWR asks for a preliminary injunction to maintain the status quo pending the final disposition of the declaratory relief action. At the January 3, 1975, hearing in this matter, upon the court's mention that DWR had not formally moved the court for preliminary injunction nor supplied the court with points and authorities, DWR dropped its request for a preliminary injunction, considering it not yet "ripe."

In its complaint, DWR asserts that the action is brought to establish liabilities and duties under the provisions of the Federal Power Act, Title 16 USC §§ 791a-828c. Jurisdiction is asserted under three separate bases:

(a) 16 USC § 825p (a segment of subchapter III of Chapter 12 of the Federal Power Act:

"The District Courts of the United States, and the United States courts of any Territory or other

place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. . . ."

(b) 28 USC § 1337:

"The district courts shall have original jurisdiction of any court action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

(c) 28 USC § 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

(2) OWID's Motions.

OWID has moved this court to dismiss the action on several grounds, or in the alternative, for summary judgment. The motion to dismiss challenges the sufficiency of the complaint on the following grounds: (a) lack of subject matter jurisdiction; (b) lack of justiciability; (c) *res judicata* effect of the decisions



of the CPUC and the California Supreme Court; (d) *res judicata* effect of a decision by the Ninth Circuit in *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir 1969); (e) there is no conflict between the decisions of the FPC and the CPUC.

OWID, in its answer, raised a counterclaim against DWR under state law for the enforcement of the CPUC order. The motion for summary judgment seeks only judgment on this counterclaim as a matter of law. Obviously, the validity of the counterclaim and OWID's motion for summary judgment is irrevocably tied to the declaratory relief action raised by DWR in the first instance.

(3) Motions by CPUC.

CPUC, the intervenor, has moved to dismiss or in the alternative, for summary judgment in its favor and against DWR on the following bases: (a) lack of jurisdiction over the subject matter on the basis of the *res judicata* effect of the CPUC and California Supreme Court decisions herein; (b) there is no conflict between the decisions of the FPC and the CPUC.

(4) DWR's Motion for Summary Judgment.

DWR has made a cross motion for summary judgment and raises the following contentions: (a) there is a conflict between the decisions of the FPC and the CPUC in this case; (b) the Federal Power act pre-empts operation of California Water Code §§ 11590-11592; (c) the decision by the California Supreme Court is not *res judicata* because not on the merits as the petition for review was untimely filed.

DECISION

It is possible to cut through the convoluted history of this case and the maze of motions herein and dispose of it by deciding the central issue.

As an initial matter, this court agrees with DWR that jurisdiction is proper here pursuant to 16 USC § 825p. While the courts of appeal have authority pursuant to 16 USC § 8251 to review on appeal orders of the FPC, the district courts are empowered pursuant to 16 USC § 825p to enforce violations of orders of the FPC or suits in equity to enforce any liability or duty created by an order of the FPC. This jurisdictional base can be read in conjunction with the Declaratory Relief Act, 28 USC § 2201, which affords power to district courts in actual cases and controversies to declare rights and liabilities between parties. In the instant case, there is a conflict between DWR and OWID in the way these agencies interpret the effect of the decisions by the FPC and the CPUC.

At the heart of the matter, however, this court must concur with OWID and the CPUC that there is, in fact, no conflict between the decisions of the FPC and the CPUC. The decision of the FPC requires that the OWID actually construct the tunnel for the Miners Ranch Canal and provides a date for completion. The decision of the CPUC notes that the operation of the DWR project will take or destroy the Miners Ranch Canal aspect of the OWID project and therefore orders the DWR to be *financially* responsible for a substitute facility.

The national importance and scope of federal power projects prevents the states from exercising a veto power over such projects as have been designated

by appropriate federal agencies. *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 66 S.Ct. 906 (1946). Nevertheless, the courts have long recognized that while the Federal Power Act confers broad federal control on power projects, the states continue to exercise compatible powers. As the Supreme Court noted in *First Iowa, supra*:

“In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The quality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction.” 328 U.S. at 167-168.

In 1969 when a decision of this court in the instant case had first been appealed to the Ninth Circuit Court of Appeals, that court recognized that the State of California through the CPUC's application of California Water Code §§ 11590-11592, had a role to play which was compatible with federal authority under the Federal Power Act. *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir 1969). In its opinion the Ninth Circuit said:

“[DWR] urges that [*First Iowa, supra*] applies. In that case, the FPC refused to issue a license until the applicant obtained approval from the state. The Court held that this gave the state a veto power over federal projects and destroyed

the effectiveness of the Federal Power Act. In the present case, however, the California Public Utilities Commission does not have a veto power over the Department's Oroville Dam Project. *It is merely charged with the duty of determining liability for damage done by one California agency to the property of another.*” [emphasis added] 409 F.2d at 536.

This court concurs that the action of the CPUC, pursuant to California Water Code §§ 11590-11592, in establishing the financial liability of DWR for the taking and destruction of a portion of the OWID project, was a permissible action. The CPUC did not substantially alter nor did it prevent the operation of federal power projects. The CPUC action was not an interference with federal power projects, but rather, was in aid of these projects. As such, the action of the CPUC was entirely compatible with the duality inherent in the Federal Power Act.

There is no doubt as to the applicability of the summary judgment procedure to a proceeding for declaratory relief. See 6 Moore's Federal Practice § 56.17 at p. 2541 (1974). Accordingly, the motions of OWID and CPUC for summary judgment are GRANTED and the motion of DWR for summary judgment is DENIED. Declaratory judgment is entered in accordance with the views expressed in this memorandum.

IT IS SO ORDERED.

DATED: August 8, 1975.

THOMAS J. MACBRIDE  
United States District Judge

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76-341-

Supreme Court, U. S.  
FILED

OCT 2 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the  
United States

OCTOBER TERM, 1976

No. 76 **76-341**

THE STATE OF CALIFORNIA, acting by  
and through the DEPARTMENT OF  
WATER RESOURCES,

*Petitioner,*

vs.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,

*Respondent.*

**Brief of Respondent the Oroville-Wyandotte  
Irrigation District in Opposition to  
Petition for Writ of Certiorari**

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76 .....

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THE STATE OF CALIFORNIA, acting by  
and through the DEPARTMENT OF  
WATER RESOURCES,

*Petitioner,*

vs.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,

*Respondent.*

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## **Brief of Respondent the Oroville-Wyandotte Irrigation District in Opposition to Petition for Writ of Certiorari**

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Respondent, The Oroville-Wyandotte Irrigation District ("OWID"), opposes the petition for writ of certiorari on the ground that petitioner Department of Water Resources ("DWR") has failed to demonstrate that "there are special and important reasons therefor" as required by Rule 19 of the Rules of this Court and on the further ground that the issues raised by petitioner, having been heard and decided by the California Supreme Court in a decision which was not appealed to this Court, are barred by res judicata.

### QUESTIONS PRESENTED

(1) Is there any "special and important reason" for granting a writ of certiorari where:

(a) petitioner admits that the controlling issue on the merits of the controversy is simply an issue of interpretation of two orders—i.e., one from the California Public Utilities Commission ("CPUC") and the other from the Federal Power Commission ("FPC") — to determine whether the two orders conflict;

(b) the California Supreme Court, the District Court below, and the Ninth Circuit Court of Appeals have all found no conflict; and

(c) there are no decisions either of the Courts of Appeals or of this Court to the contrary?

(2) Is a writ of certiorari appropriate where the issues raised by the petitioner have heretofore been adjudicated against petitioner by the California Supreme Court in a decision which petitioner failed to appeal to this Court?

### COUNTER STATEMENT OF THE CASE

The controversy which petitioner seeks to bring to this Court is between two agencies of the State of California, petitioner DWR and respondent OWID. (See Cal. Water Code Secs. 20570, 11102.)

OWID operates a system of dams, reservoirs, conduits and power houses that supplies domestic and irrigation water to several thousand residents of Butte County. These facilities are located in the South Fork of the Feather River and its headwaters. They include the Miners Ranch Canal and an associated maintenance road which run along the South Fork above the present location of Oroville Reservoir. This reservoir is a part of the State Water Project operated by DWR. The controversy between the parties

arises out of the fact that the operation of Oroville Reservoir, particularly wave action and draw down of the reservoir, impairs the stability of OWID's canal and road and threatens them with damage and destruction. OWID has contended that DWR is responsible for the effects of its reservoir and DWR has denied responsibility.

This history of the two projects is documented at length in the record before the FPC. In substance, that record shows that the planning and licensing of OWID's South Fork project occurred at a time (1952-1960) when it was contemplated that a much larger project would be built downstream which was likely to destroy or at least adversely affect OWID's project. It was not known, however, who would build that project (California or the federal government), where it would be located (Bidwell Bar or Oroville), or indeed when and whether it would in fact be built. Meanwhile, all concerned acknowledged the need for OWID's project to proceed in order to utilize the badly-needed upstream water and power resources. It was recognized that if, as and when the much larger Oroville project was undertaken, it would have priority, but it would also have the obligation to relocate or restore facilities of OWID which would be adversely affected.

The record shows that the FPC was well aware of this situation. For example, when in 1956 it first issued the license to DWR for the Oroville project (No. 2100) after having previously issued a license to OWID for the South Fork project (No. 2088), it included the following statement:

"Oroville-Wyandotte Irrigation District, Licensee for major Project No. 2088, protested the issuance of a license for the project, stating that its Palermo Canal and diversion works are located in the proposed Oroville Reservoir site and would be flooded by the proj-

ect; that the last nine miles of its 'Miners Ranch' diversion ditch, to be constructed, will be flooded at high-water stage of the proposed Oroville Reservoir as revised and now planned; and that, although it believes that satisfactory arrangements and construction can be agreed upon, until the details for preventing conflict in the operation of both projects are worked out, it feels it necessary to protest against the project. It is assumed that the Applicant will reach an agreement with the Irrigation District in this matter, but in any event the provisions of Section 10(c) of the Act make each licensee liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project or of the works appurtenant or accessory thereto, constructed under a license." (16 F.P.C. at 1340-41)

Thus from the outset, the FPC recognized that DWR might well become responsible to OWID for any adverse impact of the Oroville project on OWID's South Fork project.

The South Fork project was constructed between October 1960 and January 1963. The FPC staff regularly inspected and approved the project while under construction. Pursuant to the provisions of the California Water Code, DWR also made regular and frequent inspections of the project, certifying that the construction was progressing in a satisfactory manner. At all times, however, DWR as well as the FPC were well aware that the South Fork project was likely to require modifications as a result of the later construction of Oroville Reservoir. Thus, in 1965, DWR wrote OWID, stating in part:

"Our engineers will soon initiate definitive plans for the protection of your facilities, which include the downstream face of Ponderosa Dam, the Miners' Ranch conveyance system, and the communications

lines. This requires the investigation and evaluation of several possible schemes, and the search for sources of materials.

"The plan for relocating the communications lines is tied in with the relocation of the Oroville-Feather Falls County Road, which is expected to be firmed up in June 1965. At that time, we shall be in a position to propose a relocation of these lines, and present our proposals for the other work.

"Oroville Reservoir will start to fill in the Spring of 1967. It is our plan to commence construction required for protection of your facilities approximately June 1, 1966." (C.R. 791, 795-798)

In 1966, however, DWR changed its position and repudiated its responsibility. The litigation followed.

In October 1966, OWID filed a petition with the CPUC for an order under California Water Code Sections 11590-11592 which requires DWR to provide substitute facilities for the facilities of a state agency taken or destroyed by DWR's water project. DWR vigorously opposed the granting of relief to OWID. After lengthy hearings and related proceedings, the CPUC issued an order in March 1974 holding DWR financially responsible for (1) replacing the lower 4400 feet of Miners Ranch Canal with a tunnel, (2) providing an improved all-weather maintenance road along the remaining canal, and (3) providing slope protection below the remaining canal. (C.R. 81-89) DWR petitioned for review by the California Supreme Court, but the petition (as well as the petition for rehearing) was denied (C.R. 618, 619) and no review was sought in this Court. The CPUC order accordingly is final and binding on DWR.

In the course of the CPUC proceedings, DWR made various efforts to abort the effect of that proceeding by instituting other litigation. In 1966, it filed an action in the



United States District Court in Sacramento, based on many of the same allegations made in the instant action, to enjoin the CPUC proceedings. The District Court denied relief and the Court of Appeals for the Ninth Circuit affirmed. *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969).

In March 1967, DWR instituted proceedings before the FPC by filing a protest opposing approval of the so-called "as built" drawings which OWID had filed following completion of its South Fork project in accordance with the requirements of its FPC license. In that protest, DWR in effect asked that the FPC impose on OWID the responsibility for dealing with the effects of Oroville Reservoir on the South Fork project.

Following a hearing, the FPC examiner issued an initial decision, largely adopting the views urged by DWR, including that responsibility rested on OWID and the CPUC had no jurisdiction to grant relief. OWID filed exceptions to this initial decision and the FPC did not adopt it.\* Instead, on January 29, 1969, it issued its own order, specifically stating that it was not "expressing any opinion on the merits of the controversy." (C.R. 208-221) It ordered the parties to submit plans to deal with the problem of Miners Ranch Canal and directed the appointment of an

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\*DWR relies on this initial decision of the examiner for its assertion that "OWID failed during the construction of Miners Ranch Canal to fulfill its responsibility to design and construct the canal in a manner to operate compatibly with DWR's previously licensed Project 2100 . . . ." (Pet. 11) Since the FPC itself, on exceptions, declined to accept the initial decision and instead issued its own decision, the former is without legal standing or effect, and appellant's arguments, to the extent they are based upon it, are without foundation. See FPC Rules of Practice and Procedure, 18 C.F.R. 1.30(d).

independent Board of Consultants to review the plans and make recommendations.

After further proceedings culminating in recommendations by the Board of Consultants for construction of a tunnel and certain other protective work, the FPC adopted those recommendations (as did the CPUC in its final decision) and, on January 17, 1974, it issued its order approving OWID's drawings implementing those recommendations and providing that OWID should commence construction not later than September 1, 1974. (C.R. 222-229) The decision is entirely silent on the issue of who is to pay for the work and the CPUC's jurisdiction to decide it. It leaves no doubt, however, that the FPC considered the need for the work to result from DWR's construction and operation of Oroville Reservoir (not from any improper action of OWID):

"The structural integrity of the existing Miners Ranch Canal built in the period 1960-63 *has been affected by the development and operation of Lake Oroville Project No. 2100*, located in close proximity to Miners Ranch Canal which has an elevation of about 909 feet to 911 feet in the lower reach. This critical section would be by-passed by the proposed tunnel. Lake Oroville reached its maximum water surface elevation of 900 feet in 1969. Since that time *wave action has eroded the cut and fill slopes of the canal and lake surface fluctuations have induced numerous small slides and this action has generally degraded foundation stability along the canal. Thus the need for the tunnel has become increasingly urgent.*" (C.R. 224; all emphasis herein is added.)

The time to seek review of that order has expired and it is now final.

The complaint in the instant action was filed on October 30, 1974, shortly after the California Supreme Court had

denied review of the CPUC order. In it DWR sought to be relieved of its obligations under the CPUC order by asserting that CPUC lacked jurisdiction and its order conflicted with the FPC order. OWID filed a counterclaim for an order under Section 10(c) of the Federal Power Act (16 U.S.C. Sec. 803(c)) directing and requiring DWR to comply with the order of the CPUC. CPUC was granted leave to intervene as a defendant. On cross-motions for summary judgment, the District Court denied DWR's motion and granted those of OWID and CPUC. 411 F. Supp. 361 (E.D. Ca. 1975). The Court of Appeals for the Ninth Circuit affirmed. 536 F.2d 304 (9th Cir. 1976).

### ARGUMENT

#### **I. There Is No "Special and Important Reason" for This Court to Review the Decision of the Court of Appeals Which Merely Interpreted the Orders of the CPUC and the FPC and Found No Conflict Between Them.**

Rule 19 of this Court's rules provides in pertinent part that:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rule 19 then goes on to define factors which "while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered" in making that determination. DWR claims that just one of those factors is present here—i.e., that the "court of appeals 'has decided a federal question in a way in conflict with applicable decisions' of this court." (Pet. 20) It is apparent from the Ninth Circuit's decision and from DWR's own statement of the issues in its petition that that factor is not present.

More specifically, the Ninth Circuit, like the District Court, simply interpreted the order of the CPUC and the FPC and found that they did not conflict. It stated:

"In a well-written and comprehensive memorandum decision issued on August 8, 1975, and reported in .... F.Supp. .... (E.D. Cal. 1975), Judge Thomas J. MacBride held that CPUC decision and the FPC order were entirely compatible. We agree for the reasons set forth in Judge MacBride's decision."

DWR's statement of the questions presented in its petition likewise makes it plain that if the two orders are not read to conflict with one another, that disposes of its case on the merits. Thus, the primary issue in the case, according to that statement is:

"Does Decision 82561 of the California Public Utilities Commission issued March 12, 1974, re Application No. 48869 conflict with the Order of the Federal Power Commission issued January 17, 1974, re Projects 2088 and 2100?" (Pet. 2)

The second issue raised by DWR—a federal law pre-emption issue—arises, DWR admits, only "[i]f a conflict does exist between the decision and order referred to in Issue No. 1 ...." (Pet. 2)

There is no "special and important reason" for this Court to review the way that the Ninth Circuit interpreted the CPUC and FPC orders. DWR has cited no decisions of this Court—and we are aware of none—which conflict with its interpretation of these orders. Indeed, DWR has cited no case in which this Court has granted a petition for writ of certiorari to second-guess a Court of Appeals in its interpretation of such orders. The orders involved here are *sui generis* and applicable only to the parties. The legal impact of interpretation of the orders does not extend beyond the boundaries of this case. There is, accordingly, no reason

at all for this Court to spend its time and resources to review the determination which the Court of Appeals—as well as the California Supreme Court—has made.

**II. The District Court and Court of Appeals Correctly Held That No Conflict Exists Between the Orders of the FPC and the CPUC.**

**A. THERE IS NO BASIS FOR THE CONTENTION THAT OWID VIOLATED ITS FPC LICENSE.**

DWR contends that a conflict exists between the FPC order and the order of the CPUC and that the latter is therefore invalid. The argument appears to be based, not on the language of the two orders which clearly presents no conflict, but upon the premise that the need for substitute and modified facilities “were the result of OWID’s intentional departure from the terms and conditions of its license . . .” (Pet. 19) This theme—that OWID violated its obligations under its license—recurs several times throughout DWR’s petition. (See Pet. 11, 14, 17, 19). That this is DWR’s premise is clear from its contention that:

“ . . . as a result of the Court of Appeals’ decision, DWR is now responsible for conditions which would not have existed but for OWID’s unauthorized modifications to Miners Ranch Canal.” (Pet. 17)

It is also apparent from its assertion that:

“the decision rewards a licensee for the intentional violation of the terms of its license and the Federal Power Act, and for this reason is also in conflict with the principle set forth by lower courts that no licensee should benefit by avoidance of its obligations under the Act and its license.” (Pet. 20)

DWR’s argument—as the FPC, the CPUC, the California Supreme Court, the District Court below, and the Ninth Circuit Court of Appeals have successively recognized—is a straw man, totally lacking in substance. The

plain fact is that, notwithstanding DWR’s vigorous urging throughout this long controversy, no court or commission has ever found that OWID did not comply with the terms of its license, much less that the need for relocation and modification of project works is the result of acts or omissions of OWID.\* The initial decision of the FPC examiner, who is the only one who ever accepted DWR’s contentions, was not adopted by the FPC. Instead of adopting the views urged in the initial decision, the FPC found in its final decision that:

“The structural integrity of the existing Miners Ranch Canal built in the period 1960-63 has been affected by the development and operation of Lake Oroville Project No. 2100, located in close proximity to Miners Ranch Canal which has an elevation of about 909 feet to 911 feet in the lower reach. This critical section would be by-passed by the proposed tunnel. Lake Oroville reached its maximum water surface elevation of 900 feet in 1969. Since that time wave action has eroded the cut and fill slopes of the canal and lake surface fluctuations have induced numerous small slides and this action has generally degraded foundation stability along the canal. Thus the need for the tunnel has become increasingly urgent.” (C.R. 224)

Had the FPC shared DWR’s view that the problems of the South Fork project were the result of OWID’s unauthorized deviations from its license, it surely would have said so instead of making an unqualified finding that the integrity of Miners Ranch Canal “has been affected by the development and operation of Lake Oroville Project No. 2100.”

\*The record before the FPC established that DWR’s contention was made of whole cloth, and that, far from making unauthorized deviations, OWID’s construction was approved at every step of the way not only by the FPC but by DWR itself.



Nor has DWR's contention in this respect been adopted by any of the other courts and agencies that have reviewed it. DWR has advanced it without success to the CPUC, the California Supreme Court, the District Court below and the Ninth Circuit Court of Appeals.

What DWR asks this Court to do, in other words, is to find on the basis of DWR's unsubstantiated charge of violation of OWID's license—a charge which two regulatory agencies and three courts have never accepted—that a conflict exists in the orders where none appears on their face. Such a finding would be baseless and unwarranted.

**B. THE FPC DID NOT PURPORT TO DETERMINE FINANCIAL RESPONSIBILITY FOR THE MODIFICATIONS IT APPROVED IN ITS ORDER.**

Article 51 of OWID's license (Pet. 13), on which DWR's claim is based, carefully refrains from dealing with the matter of financial responsibility. It directs OWID to commence and prosecute construction of the approved modifications as one would expect, for the modifications are of OWID's facilities. But it is silent as to who is to pay for the work.

The record shows that as long ago as 1956 the FPC, in issuing its first license to DWR for the Oroville project, recognized that DWR might be held liable for damage to OWID's project. (See pp. 3-4, above.) Article 51 is entirely consistent with the view that the FPC meant to leave the question of liability to be decided by other appropriate tribunals. That the FPC itself did not regard Article 51 as a determination of liability is reflected in its own decisions. Thus, in the order adding Article 51 to OWID's license in 1974, it described it merely as "set[ting] a time schedule for the completion of tunnel construction." (C.R. 225) And in January 1975, it issued an order modifying Article 51 so as to extend that time schedule on account of the pending litigation over liability.

Had the FPC considered Article 51 as imposing liability on OWID, preempting the CPUC's determination, it is unlikely that it would have dealt with that article in this manner. And that it did so can certainly not be attributed to inadvertence or ignorance of the issue of liability which, as the FPC well knew, was being vigorously litigated by the parties. It certainly would have made findings that OWID had failed to comply with its license had it meant to adopt the contention, on which DWR's entire position on the merits rests, to the effect that OWID should be held responsible for what allegedly are the consequences of its unauthorized deviations. Yet it did not do so.

For DWR to contend here that the FPC intended to decide the liability issue (thereby preempting CPUC) is strange indeed in view of the fact that after the initial decision had issued, DWR changed its position before the FPC on this issue. Previously the FPC's staff, in its reply brief to the examiner, had criticized DWR for urging that the FPC should adjudicate liability and contended that this issue "should be left to an appropriate court or administrative proceeding." (C.R. 775) When it filed its brief with the FPC, DWR apparently decided to join in that position, contending that liability was *not* an issue before the FPC. Counsel for DWR confirmed this fact in oral argument before the FPC when he declared: "We do not ask that this Commission decide as between OWID and the Department liability."\* (C.R. 206-207)

To contend, in these circumstances, that the FPC order adjudicated liability in conflict with the CPUC order is

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\*Even in the district court, DWR at first conceded, perhaps inadvertently, that "The only issue with which the FPC did not deal was whether the State of California could impose on DWR an obligation to finance the modifications which the FPC directed OWID to undertake." (C.R. 319) That concession would seem to remove any possibility of conflict between the orders.

baseless. There is nothing contradictory about these orders—either in their language or their intent. They are in fact being carried out at this time without difficulty. DWR would have this Court go out of its way to find a conflict between federal and state jurisdictions where the agencies involved have themselves successfully accommodated their respective jurisdictions.

**C. THE DETERMINATION OF LIABILITY FOR THE ADVERSE EFFECTS OF A PROJECT IS NOT WITHIN THE FPC'S JURISDICTION.**

An additional reason why Article 51 must be read as not adjudicating liability to pay for the modifications is that both the Federal Power Act and the decisions under it have left liability for the consequences of a project to be determined by courts or other appropriate agencies.

Section 10(c) of the Act (16 U.S.C. Sec. 803(c)) provides, in relevant part:

“Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.”

The Courts and the FPC have uniformly held that the FPC has no power to adjudicate liability under Section 10(c) once a license is issued. While the FPC possesses the power to determine the allocation of responsibility *prior* to the issuance of a license (see, e.g., *Susquehanna Power Co.*, 32 F.P.C. 826, 56 P.U.R.3d 194, 199-200 (1964)), after a license is issued, liability for damage must be adjudicated in other forums. This view has been repeatedly stated by the FPC. See *Alabama Power Co.*, 33 F.P.C. 1105, 1107, 53 P.U.R.3d 407, 410 (1965); *Idaho Power Co.*, 29 F.P.C. 572,

48 P.U.R.3d 20, 21 (1963). The FPC could not have been more explicit when it held in *Idaho Power*:

“Dispositive of the present complaint, however, is the consideration that, assuming the State of Oregon has sustained damage by reason of the Licensee's negligence and is entitled to a recovery therefor, *the Federal Power Commission is not the forum in which to litigate the issue of negligence and to determine the amount of the damage.*” 29 F.P.C. at 572.

Moreover, Section 21 of the Act (16 U.S.C. Sec. 814) establishes, and this Court's decision in *Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930), and numerous other decisions confirm, that a state tribunal is a proper forum for adjudicating liability under Section 10(c). See *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132 (S.C. 1950); *Great No. Ry. v. Washington Elec. Co.*, 86 P.2d 208 (Wash. 1939); *Alabama Power Co. v. Smith*, 155 So. 601 (Ala. 1934). DWR has cited no authority to the contrary, and we know of none.

**D. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS DO NOT CONFLICT WITH FIRST IOWA.**

The only decision of this Court upon which DWR relies is *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), which DWR says “affirmed the exclusive regulatory powers of the FPC in the licensing of hydroelectric projects.” (Pet. 19) Whether that is a correct reading of *First Iowa* is irrelevant since, as discussed above (p. 9), DWR itself acknowledges that the federal pre-emption issue arises if and only if the CPUC order and the FPC order are interpreted to conflict with one another, and there is no need or reason for the Court to review that matter. Obviously, there is no basis for finding that state law is pre-empted as an abstract propo-



sition. There being no conflict between Article 51 and the CPUC order by their terms, the question is moot.

The fact is, however, that DWR's application of *First Iowa* to the situation in this case is wrong. As another Ninth Circuit panel stated in an earlier decision in this controversy:

"[DWR] urges that *First Iowa Hydroelectric Co-operative v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143, applies. In that case, the FPC refused to issue a license until the applicant obtained approval from the state. The Court held that this gave the state a veto power over federal projects and destroyed the effectiveness of the Federal Power Act. In the present case, however, the California Public Utilities Commission does not have a veto power over the Department's Oroville Dam Project. It is merely charged with the duty of determining liability for damage done by one California agency to the property of another." (409 F.2d at 536)

The District Court in this case agreed stating:

"This court concurs that the action of the CPUC, pursuant to California Water Code §§ 11590-11592, in establishing the financial liability of DWR for the taking and destruction of a portion of the OWID project, was a permissible action. The CPUC did not substantially alter nor did it prevent the operation of federal power projects. The CPUC action was not an interference with federal power projects, but rather, was in aid of these projects. As such, the action of the CPUC was entirely compatible with the duality inherent in the Federal Power Act." 411 F. Supp. at 368.

These views accord both with the terms of the Federal Power Act and with the decision of this Court. Because Sections 10(c) and 21 of the Act expressly reserve to the states the power to determine such matters as the liability of a licensee for damage to another's property (see pp.

14-15 above), it is clear that the Act does not preempt these areas of state law. This Court has expressly decided that Section 10(c) and the other saving provisions are intended to:

"[S]o restrict the operation of the entire [Federal Power] [A]ct that the powers conferred by it and the [Federal Power] Commission do not extend to the impairment of the operation of those [state] laws . . . ." *Ford & Son, Inc., v. Little Falls Fibre Co.*, above 280 U.S. at 378. See also *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 255 (1954).

Nothing contained in *First Iowa* is to the contrary.

### III. The Precise Issue Before This Court Has Heretofore Been Finally Adjudicated.

An additional reason for denying the petition arises from the fact that the same issues were raised by DWR before the CPUC and the California Supreme Court and were decided against it.

DWR raised all of the issues concerning federal preemption in seeking review of the CPUC proceedings and they were fully litigated there. In particular, DWR raised without any reservation the very same issues of alleged conflict between the CPUC and FPC orders in its petitions for review in the California Supreme Court. That court rendered its decision by denying the petition, and that, according to this Court, is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right . . . under the Constitution of the United States. . . ." *Napa Valley Elec. Co. v. Railroad Comm'n*, 251 U.S. 366, 372 (1920). Such an adjudication is res judicata as to all issues presented, 251 U.S. at 373; *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 268 P.2d 723 (1954).



Since this Court's decision in *Napa Valley Elec. Co.*, federal courts repeatedly have dismissed on the basis of res judicata claims arising from CPUC proceedings which previously had been presented to the California Supreme Court and adjudicated by the denial of a writ of review. See *Southern Pacific Co. v. Van Hoosear*, 72 F.2d 903, 905 (9th Cir. 1934); *Wallace Ranch Water Co. v. Railroad Comm'n*, 47 F.2d 8, 10 (9th Cir. 1931); *Consolidated Freightways, Inc. v. Railroad Comm'n*, 36 F. Supp. 629, 270-71 (N.D. Cal. 1941); *Oilwell Express Corp. v. Railroad Comm'n*, 11 F. Supp. 665, 668 (S.D. Cal. 1935); *Betts v. Railroad Comm'n*, 6 F. Supp. 591, 592 (S.D. Cal. 1933), *aff'd per curiam*, 291 U.S. 652 (1934); *Finn v. Railroad Comm'n*, 2 F. Supp. 891, 893 (N.D. Cal. 1933). In no case has a federal court allowed a party to relitigate such a claim after having once lost before the California Supreme Court.\*

DWR purported to "reserve" its federal law claims at the outset of the CPUC proceedings but that is not a magic

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\*DWR contended below that it could relitigate these issues again on the strength of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Its reliance on *England*, however, is misplaced. *England* allows a party properly before a federal court—either as a plaintiff or as a defendant in a removed action—to return to federal court if the federal action is stayed to allow the parties to initiate an action in state court to obtain a decision regarding a controlling, but unsettled, question of state law. Once the state court action is completed, the federal court lifts its stay, and *England* merely precludes invoking res judicata at that point based on the state court action. See C. Wright, *Handbook of Law of Federal Courts*, 198-99 (2d ed. 1970). This is not a case where DWR was shunted from federal to state courts in order to allow state court resolution of unsettled state law issues. From the outset DWR was a respondent in the state administrative proceedings brought to enforce DWR's statutory obligations. DWR sought to escape those obligations by asking the federal courts to enjoin the administrative proceedings. The federal courts declined to do so, not on the ground of abstention to permit resolution of unsettled state law issues, but to avoid federal court interference in pending state proceedings. *State of California v. Oroville-Wyandotte Irrigation Dist.*, 409 F.2d 532, 536 (1969). In such a situation there is no right to return to federal court. See C. Wright, above at 200.

incantation giving it two bites at the apple. DWR in fact litigated those issues fully up to the California Supreme Court. Having done so, it has no right to start over again in this proceeding.

### CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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Dated: September 30, 1976.

Supreme Court, U. S.  
FILED

SEP 28 1976

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1976

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**No. 76-341**

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THE STATE OF CALIFORNIA, acting by and through  
the DEPARTMENT OF WATER RESOURCES,  
*Petitioner,*

VS.

THE OROVILLE-WYANDOTTE IRRIGATION  
DISTRICT, an irrigation district,  
*Respondent.*

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On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF FOR INTERVENOR-RESPONDENT  
IN OPPOSITION**

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Dated: September 27, 1976

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# In the Supreme Court

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DISTRICT, an irrigation district,  
*Respondent.*

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

## BRIEF FOR INTERVENOR-RESPONDENT IN OPPOSITION

The California Public Utilities Commission (CPUC) respectfully prays that a writ of certiorari *not* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled action on June 3, 1976.

### OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Eastern District of California appear in Appendices A and B to the Petition.

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### JURISDICTION

The jurisdictional requisites are set forth in the Petition. The CPUC was granted intervention in the action before the United States District Court for the Eastern District of California. The District Court's decision granted the motion of both respondent Oroville-Wyandotte Irrigation District (OWID) and respondent CPUC for summary judgment against petitioner Department of Water Resources (DWR). The United States Court of Appeals for the Ninth Circuit expressly adopted and affirmed the District Court's opinion.

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### QUESTIONS PRESENTED

The question before this Honorable Court are set forth in the Petition.

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### CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Some of the constitutional provisions and federal and state statutes involved herein are set forth in the

Petition (United States Constitution, Article I, Section 8, clause 3; Section 10 of the Federal Power Act, 49 Stat. 842 (1935), 16 U.S.C. Sections 803(a), 803 (b) and 803(c); Section 317 of the Federal Power Act, 49 Stat. 862 (1935), 16 U.S.C. Section 825(p); California Water Code Sections 11590, 11591 and 11592). However, the following statutes and regulations are also relevant to this proceeding:

Section 21 of the Federal Power Act, 41 Stat. 1074 (1920), 16 U.S.C. Section 814:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, *or in the State courts*. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000." (Emphasis added.)

Section 27 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. Section 821:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

#### STATEMENT OF THE CASE

Both petitioner DWR and respondent OWID are agencies of the State of California (California Water Code, Section 11102) and both agencies are licensees of the Federal Power Commission (FPC) by virtue of their respective water projects, Major Power Project No. 2100 (DWR's Oroville Project) and Major Power Project No. 2088 (OWID's South Fork Project) located in the Feather River Basin of California.

DWR constructed and presently operates a reservoir on the Feather River in Butte County, California, known as the Oroville Reservoir. The Oroville Reservoir is licensed as part of DWR's Project No. 2100. OWID constructed and presently operates a canal, known as the Miners Ranch Canal, which is located above and parallel to a portion of the Oroville Reservoir in the Feather River's South Fork Canyon. The Miners Ranch Canal is licensed as part of OWID's Project No. 2088. OWID's Miners Ranch Canal was completed approximately four years prior to the completion of DWR's Oroville Reservoir.

On October 14, 1966 OWID filed an application (Application No. 48869) with the CPUC for an order determining OWID's rights with respect to DWR resulting from alleged damage to OWID's Miners Ranch Canal by the impending operation of DWR's Oroville Reservoir. The statutory authority for the assertion of jurisdiction by the CPUC was Sections 11590 through 11592 of the California Water Code.

On November 17, 1966 OWID, pursuant to Article 5 of its FPC license for Project No. 2088, filed with the FPC maps and plans showing certain project works of Project No. 2088 as they were actually constructed and also filed a written statement describing and supporting divergencies and variations between those project works actually constructed and those previously authorized by the FPC. Among the facilities depicted by these maps and plans were the Miners Ranch Canal and its appurtenant facilities. DWR filed a protest against the approval of OWID's "as built" drawings on the ground, among others, that OWID made substantial alterations in parts of its Project No. 2088, including the Miners Ranch Canal and its appurtenant facilities, without the FPC's prior approval.

After hearings regarding OWID's application for approval of its "as built" drawings, the FPC Presiding Examiner in his *initial decision* questioned the CPUC's jurisdiction over the subject dispute between DWR and OWID; found that the operation of DWR's Oroville Reservoir would destroy certain portions of OWID's Miners Ranch Canal, because the



canal was not designed and constructed to withstand the potential effects of DWR's Oroville Reservoir; recommended that approval of OWID's "as built" drawings of the Miners Ranch Canal be denied; and implied that OWID should bear all initial costs of construction. OWID filed exceptions to the *initial decision* of the FPC's Presiding Examiner. DWR filed a brief in opposition to OWID's exceptions, and oral argument on exceptions was held before the FPC *en banc*.

Thereafter, the FPC (the Commission itself and not merely the Presiding Examiner) issued an order (41 FPC 100) that OWID file revised plans regarding the Miners Ranch Canal, and that it retain a three-member Board of Consultants "to assess and review the adequacy and soundness of OWID's revised plans for the Miners Ranch Canal or for a suitable facility to replace such a canal." DWR was given an opportunity to submit to the Board of Consultants any alternative proposals which it believed necessary to assure the adequacy and soundness of the Miners Ranch Canal or necessary to provide a suitable facility to replace such canal. Upon receipt of OWID's revised plans and DWR's alternative proposals, if any, the Board would submit to these parties its report of findings as to the feasibility and desirability of the plan or plans which it found most appropriate for the revision or replacement of the Miners Ranch Canal. Upon receipt of the Board's report OWID and DWR, either individually or jointly, would file with the FPC their respective plans for the revision

or replacement of the Miners Ranch Canal, together with a copy of the Board's report. The FPC denied DWR's application for rehearing or modification of its order of January 29, 1969 (41 FPC 234).

While the FPC proceedings were in progress, the CPUC issued a series of decisions wherein it asserted its jurisdiction over the subject matter of Application No. 48869; held there was no jurisdictional conflict with either the federal courts or the FPC by virtue of the CPUC's assertion of jurisdiction; concluded that portions of the Miners Ranch Canal would be taken or destroyed, within the meaning of Section 11590 of the California Water Code, by the operation and maintenance of DWR's Oroville Reservoir; and determined that DWR would in effect, have to replace the Miners Ranch Canal. However, the CPUC also stated that *it would retain jurisdiction of the proceedings for all purposes and that the proceedings could be reopened if the parties agreed on an alternative facility or if the FPC failed to approve the new project.*

Both the United States District Court for the Eastern District of California and the United States Court of Appeals for the Ninth Circuit denied the motion of DWR to dismiss the CPUC proceedings. The courts recognized the CPUC's "primary right to determine its own jurisdiction" and that the CPUC was "charged with the duty of determining the liability for damage done by one California agency to the property of another." (*State of California v. Oroville-Wyandotte Irr. Dist.*, 409 F.2d 532, 536 (9th Cir. 1969).)

On February 18, 1970 the FPC issued an order summarizing the findings of its Board of Consultants and requiring that the recommendations of the Board be implemented (43 FPC 200). In this respect the FPC ordered that OWID submit to the FPC, within six months, revised plans and exhibits to implement the Board's recommendations, and that DWR cooperate as much as possible in the situation. Based on the Board's report the FPC ordered certain modifications to the Miners Ranch Canal which differed from the modifications recommended by the CPUC. Thereafter, the CPUC, on motion by OWID, modified its earlier decision to incorporate the proposals for "substitute facilities" approved by the FPC in its order of February 18, 1970. However, based on its previous finding of a taking and destruction of the Miners Ranch Canal by DWR's Oroville Reservoir, the CPUC ordered that *DWR* should be "financially responsible" for the substitute facilities (CPUC Decision No. 82561).

The CPUC denied rehearing of Decision No. 82561, and the California Supreme Court denied DWR's petition for writ of review and for rehearing of the Court's denial.

In the meantime the FPC issued an order on January 17, 1974 approving OWID's final plans and exhibits and ordered OWID to commence construction of the "substitute facilities." However, at no time did the FPC determine who should bear the cost of the construction. DWR did not seek federal review of any of the FPC orders, and the time to do so has expired.

Finally, the United States District Court and the United States Court of Appeals have denied DWR's attempts to overturn the CPUC's decision.

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#### WHY CERTIORARI SHOULD BE DENIED

Petitioner DWR is making claims before this Court which the California Supreme Court, the United States District Court for the Eastern District of California and the United States Court of Appeals for the Ninth Circuit have unanimously rejected. None of these tribunals has seen any merit in DWR's contention that a conflict exists between the decisions of the CPUC and the FPC with respect to the respective projects of DWR and OWID. On the contrary, these courts have stated that:

"The CPUC did not substantially alter nor did it prevent the operation of federal power projects, but rather, was in aid of these projects. As such, the action of the CPUC was entirely compatible with the duality inherent in the Federal Power Act." (*State of California v. The Oroville-Wyandotte Irrigation District*, 411 F.Supp. 361, 368 (E.D. Cal. 1975)).

DWR contends that this language ignores OWID's departure from the terms and conditions of its FPC license and in fact rewards a licensee for violations of the terms of its license. However, DWR fails to note that the FPC never stated that it was OWID's actions which destroyed the Miners Ranch Canal. In-



stead, the FPC stated that the structural integrity of the Miners Ranch Canal was affected by the development and operation of DWR's Project No. 2100.

DWR correctly states that Rule 19(1)(b) of the Supreme Court Rules provides that one of the grounds for certiorari is where a court of appeals "has decided a federal question in a way in conflict with applicable decisions" of this court. The CPUC, submits, however, that DWR is incorrect in alleging that the decision of the United States Court of Appeals for the Ninth District "substantially erodes the comprehensive regulatory scheme" set forth in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). In *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969), the Court of Appeals stated as follows:

"The Department urges that *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143, applies. In that case, the FPC refused to issue a license until the applicant obtained approval from the state. The Court held that this gave the state a veto power over federal projects and destroyed the effectiveness of the Federal Power Act. In the present case, however, the California Public Utilities Commission does not have a veto power over the Department's Oroville Dam Project. It is merely charged with the duty of determining the liability for damage by one California agency to the property of another." (409 F.2d at 536.)

The CPUC respectfully submits that it carried out this duty, especially in light of the FPC's specific re-

fusal to make a determination as to whether OWID or DWR was liable for the "substitute facilities" for the Miners Ranch Canal. In taking this action the CPUC was complying fully with the mandate of the *First Iowa* decision.

DWR incorrectly contends that Articles 48 and 51 of OWID's license places full financial responsibility upon OWID for the modification of the Miners Ranch Canal. Neither Article 48 nor Article 51 places financial responsibility upon OWID for modifications to the Ponderosa Dam or the Miners Ranch Canal. Both of these projects were controlled and operated by OWID. OWID was the logical party to *perform* the protective measures with respect to both projects. However, it was the workload, and not any financial responsibility, to which OWID acquiesced regarding these Articles.

Petitioner's reliance on *Pacific Power and Light Company v. Federal Power Commission*, 333 F.2d 689 (9th Cir. 1964) is also misplaced. The *Pacific Power* case, cited by DWR as support for its interpretation of Article 51 herein, is clearly distinguishable from the present case. In the *Pacific Power* case only Pacific Power & Light Company was an FPC licensee. The Department of Fish and Game was merely a protestant in Pacific Power's license proceeding. In the present case both DWR and OWID are licensees. In the *Pacific Power* case the FPC found that since the licensee (Pacific Power) created the situation which necessitated the fish hatchery, namely the construction of the Iron Gate Dam, it was reason-



able to require that it pay the cost of construction thereof. In the present case the FPC found that DWR's operation of the Oroville Reservoir affected the structural integrity of OWID's Miners Ranch Canal. Under the theory of the *Pacific Power* case DWR created the situation which necessitated the "substitute facilities" for OWID's Miners Ranch Canal. Therefore, it would have been reasonable for the FPC to require that DWR pay the cost of construction thereof. However, as stated above, the FPC specifically refused to rule on the issue of DWR's or OWID's liability for these substitute facilities.

The language from the *Pacific Power* case quoted by DWR at page 18 of the Petition relates to Pacific Power's contention to the Court in that case that the licensee's settlement agreement with the Department of Fish and Game, which predated the issuance of the license for the subject project, as well as Articles 49 and 50 of the amended license, gave Pacific Power a contract right to have the state *maintain and operate* the hatchery. Having already determined that the licensee had the financial responsibility for the construction of the hatchery, it was reasonable for the Court to conclude, *absent any agreement to the contrary*, that the licensee should be financially responsible for maintaining and operating the hatchery. In the present case Article 51 contains no language dealing with *maintenance or operation* of the substitute facilities, and as stated above, the FPC refused to determine who would be financially responsible for the construction of these facilities.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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